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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

FEDERATION OF LORTON COMMUNITIES,

Petitioner,

v.

MARION BARRY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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At the very outset of its argument opposing the issuance of a writ of certiorari, the County of Fairfax describes the issue,

> "correctly stated by the court of appeals as simply whether Congress' intention that the District of Columbia exercise 'complete and exclusive control and management' over the Lorton Reservation constitutes 'jurisdiction' within the meaning of D.C. Code Ann. § 1-337(c)."

Brief in Opp. at 11-12. In fact, Congress *never* gave the District complete and exclusive control and management *over the Lorton Reservation.* Congress gave the District such control only over the *institutions* located *on* the Reservation. *See* Act of March 16, 1926, Pub. L. No. 47, 44 Stat. 208, 209, D.C. Code Ann. 3-106; Act of June 27, 1946, Pub. L. No. 459, 60 Stat. 320, D.C. Code Ann. §24-442.

The failure of the respondents and of the court of appeals to recognize the significance of this distinction is symptomatic of the result-driven approach which each has taken toward section 1-337(c). All have discounted or overlooked the fact that Congress limited the District's authority under section 1-337(c) to land located within the District. All have assumed that Congress intended the District to have authority to rent all the surplus land which it either owned or controlled, wherever located, and concluded, in order to achieve that result, that when Congress used the word "jurisdiction" in D.C. Code Ann. §1-337(c), it acted with the understanding that the term was equivalent to proprietary interests such as "use," "possession," and "control."

The difficulty with this argument is obvious. The statute expressly *says* "jurisdiction," and neither the court of appeals nor respondents have *ever* produced a single shred of legislative history to demonstrate that Congress meant anything other than what it said.[1]

Respondents having argued, and the court below having ruled, that the District's "complete and exclusive control and management over the Lorton Reservation constitutes

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[1] When Congress wishes to equate jurisdiction with control, it specifically says so. *See, e.g.* 48 U.S.C. §§747, 749. *Compare, e.g.*, 43 U.S.C. §931a.

jurisdiction", they must now accept the logical consequence of their position. If these terms *are* equivalent, then Congress conveyed jurisdiction when it granted the District such "complete and exclusive control and management."

Fairfax County argues that the constitutional implications of such an act need not be addressed because the court of appeals "has construed the statute [§ 1-337(c)] so that *it* does not violate the constitution." Brief in Opp. at 19 (emphasis added). In this, they miss the point somewhat because the issue is not so much whether section 1-337(c) is constitutional as whether the statutes conveying the proprietary interests which the court found equivalent to jurisdiction are constitutional. They do appear to recognize that if "jurisdiction" in section 1-337(c) actually means "jurisdiction" as the term is typically construed a constitutional issue *would* arise. They argue, however, that the Fourth Circuit cleverly avoided that constitutional question by defining "jurisdiction" to mean "use," "possession," and "control," but *not* "jurisdiction."

Completely overlooked in this rush to debase the English language is the fact that there was an easier way for the court to fulfill its obligation to interpret the statute in such a way as to avoid a constitutional issue. All that was required was for the courts below to take note of the fact that the District of Columbia did not have jurisdiction over the Reservation and could not, therefore, avail itself of the authority to use the land for a purpose other than that for which its use was dedicated by Congress. This approach would have been consistent with the facts and with the whole body of law by which Congress has delimited the conveyance of proprietary interests in federal lands. This alternative completely

escapes the attention of the Respondents, not because it fails to avoid a constitutional issue, but because it ultimately achieves an unacceptable *result.*

Respondent attempts to minimize the significance of the decisions here and in *Glenn Dale* by arguing that they apply to only one little subsection of the District of Columbia Code – that when Congress used the word "jurisdiction" in section 1-337(c), it meant the term to have a unique meaning applicable exclusively to that section and that section alone. The difficulty with this position is that the court's decision holding that "the District's right to possession and use" of the Lorton Reservation "equaled jurisdiction" under that statute does not provide any basis for limiting its decision to that statute. The court did not rest its decision on any language in the statute or in the legislative history to support its conclusion. It simply ruled that the words were equivalent. If "possession" and "use" are equivalent to the word "jurisdiction" in that statute, the court's holding provides no principled reason for precluding such an interpretation of these same words in other statutes. In short, the decision of the court of appeals is limited neither by geography nor the bindings of the District of Columbia Code. If Congress has the power to convey to the District of Columbia jurisdiction over land located in Virginia without the consent of Virginia, it has the power to convey to *any* entity jurisdiction over federal land located in *any* state.

Fairfax County's *post hoc* defense of the Fourth Circuit's decision is without any support in legislative history. It is completely inconsistent with what legislative history is available. And it is, moreover, flatly inconsistent with the decision itself. The Court did not attempt to argue that "jurisdiction" did not mean "jurisdiction."

The court's conclusion in *Glenn Dale*, that "[t]he District has jurisdiction," Petition, App. at 19a, was premised on the presumed equivalence between jurisdiction, use, possession, and control.

It is perfectly clear, furthermore, that the District of Columbia is using the decision of the Fourth Circuit in *Glenn Dale* and *Federation of Lorton Communities* to claim jurisdiction over these properties, not merely some form of proprietary interest. In its Motion for Publication of Opinion, the District of Columbia stated that "[t]he District is an institutional litigant with jurisdiction over several properties in Virginia and Maryland titled in the name of the United States." Motion by the District of Columbia for Publication of Opinion, July 23, 1987 at 1. If the District has jurisdiction over these properties, it was obtained without the consent of the states within which the land is located, in direct violation of Article I, sec. 8, cl. 17 of the Constitution of the United States.

It is completely misleading to say that the United States has "accepted" *Glenn Dale* because no petition for certiorari was filed. As noted in this Petition (p. 13), the only issue which the Fourth Circuit was called upon to resolve in that case was whether section 1-337(c) applied to property owned by the United States. The government's argument that it did not was clearly incorrect. Having utterly failed in *Glenn Dale* to raise the issues presented in this petition, the United States could not have raised such issues in a certiorari position.

Nor has the United States approved the use of the Lorton Reservation for purposes other than a prison. The letter from Mr. Habicht (Brief in Opp., App. D) does not purport to approve the use of the Lorton Reservation as

a landfill on behalf of the United States. The letter states only that the Department of Justice has no objection to such use. The fact that the Department of Justice has no objection to the incinerator conveys a certain patina of legitimacy. But the proffered letter is nothing more than a legal opinion. It has as much value as a legal opinion from the District of Columbia's own corporation counsel or any other attorney. It cannot fulfill the role cast for it by the Respondent because it lacks a necessary antecedent. There is absolutely no evidence in the Record to demonstrate or even suggest that the Department of Justice has the authority to approve the use of the Lorton Reservation for purposes other than those designated by Congress.

The Constitution places the power over federal lands in the hands of Congress. U.S. CONST., Art. I, sec. 8, cl. 17, Art. IV, sec. 3, cl. 2. *See also Alabama v. Texas,* 347 U.S. 272 (1972); *Camfield v. United States,* 167 U.S. 518 (1897). Congress may delegate that authority.[2] *See, e.g. United States v. Cassingnol,* 420 F.2d 868 (4th Cir. 1970), *cert. denied,* 397 U.S. 1044 (1970). But there is absolutely no evidence here that Congress has delegated its authority over the Lorton Reservation to the Department of Justice – or any other federal agency, for that matter. Absent such a delegation of authority, the Department of Justice has no authority whatsoever to allow or consent, on behalf of the United States, to such additional uses. The power of Congress to make rules and regulations concerning the use of land belonging to the United States is without limitation and preempts that of the Executive unless Congress specifically authorizes

[2] Recognition of this fact is no concession. The delegation of authority at issue here is precluded because it is predicated on a separate delegation of jurisdiction which is impermissible absent the consent of the state within which the land is located.

the Executive to exercise such powers. *See, e.g., United States v. Matherson,* 367 F. Supp. 779 (E.D.N.Y. 1973), *aff'd,* 493 F.2d 1399 (2d Cir. 1974). *See also Van Brocklin v. Tennessee,* 117 U.S. 151 (1886); *Butte City Water Co. v. Baker,* 196 U.S. 119 (1905); *United States v. City and County of San Francisco,* 310 U.S. 16 (1940); *United States v. California,* 332 U.S. 19 (1947).

Thus, absent any delegation to the Executive of its authority over federal lands, such authority rests exclusively with Congress. If there is to be any approval of the use of the Lorton Reservation for purposes other than those set forth in the Act of March 3, 1909, it must come from Congress itself.

Finally, the fact that Congress has taken no action to prevent the use of the Lorton Reservation as a landfill or incinerator is of no consequence. There is no authority absent an express grant, *Hazard v. Blessing,* 2 F.2d 916 (D.C. Cir. 1924); and there is no ratification by acquiescence – particularly where, as here, there is no indication Congress was aware of the action in which it is said to have acquiesced. *EEOC v. CBS, Inc.,* 743 F.2d 966, *motion denied* 748 F.2d 124 (2d Cir. 1984).

Respectfully submitted,

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